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**Neither Confirm Nor Deny, the Vienna Convention on Diplomatic Relations,
and WikiLeaks evidence in judicial review of the Chagos Marine Protected
Area**
Laura Jeffery

Abstract

This article highlights some of the challenges faced in attempts to establish the evidential status in English law of leaked documents published by WikiLeaks. The UK Government's NCND policy is to Neither Confirm Nor Deny the veracity of leaked information, but is this policy binding on English courts? The Vienna Convention on Diplomatic Relations requires the receiving state to secure the documents of a diplomatic mission on its territory, but who is responsible for diplomatic correspondence once it is sent elsewhere – increasingly electronically and to multiple virtual locations – and leaked outwith the receiving state's jurisdiction? Can leaked diplomatic correspondence – such as the over a quarter of a million US Embassy cables released during Cablegate – be authenticated and accepted as legal evidence? This article addresses such questions with reference to the debates in court about the admissibility or inadmissibility of a leaked US Embassy cable submitted as evidence that the UK Foreign Secretary established a Marine Protected Area around the Chagos Archipelago in the Indian Ocean with the 'improper purpose' or ulterior motive of preventing the displaced Chagos islanders from returning to their homeland.

Labour's environmental legacy?

On 1 April 2010 – a month before general elections in both the UK and Mauritius, and on a day when neither parliament was sitting – the UK's then Foreign Secretary David Miliband announced that he was instructing the Commissioner of the British Indian Ocean Territory (BIOT) to declare the world's largest no-take (i.e. no fishing) Marine Protected Area (MPA) around the contested Chagos Archipelago in the Indian Ocean (see Jeffery 2013). The UK Government had excised the Chagos Archipelago from colonial Mauritius in 1965, and had depopulated the islands by 1973. The largest Chagos island of Diego Garcia has been the site of a major US overseas military base since 1971. Meanwhile, displaced Chagos islanders in Mauritius and Seychelles have struggled for adequate compensation and their right of return to the Chagos Archipelago.

Miliband claimed firstly that the declaration of an MPA had no implications for the future ceding of the Chagos Archipelago to the Republic of Mauritius when Diego Garcia is no longer required for US and UK defence purposes, and secondly that it was 'without prejudice' to the then pending European Court of Human Rights (ECtHR) proceedings concerning the right of return of the displaced Chagos islanders.¹ Critics immediately suggested instead that the Labour Government's emphasis on its environmental legacy was intended to conceal its ulterior motives: firstly to entrench British sovereignty in the guise of

internationally recognised environmental stewardship; secondly to strengthen its assertion of the unfeasibility of Chagossian resettlement by alleging that human resettlement was incompatible with environmental conservation; and thirdly to protect the remote character of the US military base on the island of Diego Garcia, which was specifically excluded from the MPA and is therefore not subject to the same stringent environmental controls (see Sand 2010: 232–233).

Whilst in opposition, the Conservative MP William Hague and the Liberal Democrat leader Nick Clegg MP criticised the Labour Government's approach and voiced their support for a 'fair settlement' for the displaced Chagossian community. When the Coalition Government was formed in April 2010, with Nick Clegg as Deputy Prime Minister and William Hague as Foreign Secretary, Chagossian leaders were therefore hopeful for a change in their fortunes. However, the Coalition Government's initial intention was 'not to change the fundamental policy on resettlement, compensation and on the Marine Protected Area'.² Firstly, the Government would continue to contest the ECtHR case because it had been convinced by the 'feasibility and defence security' arguments against human resettlement.³ Secondly, the Government considered that a 'full and final' settlement had already been accepted, and that the Chagossians' subsequent claims for further compensation were time-barred.⁴ Thirdly, the Government announced that it would retain the MPA, and the last licences for fishing in BIOT expired at the end of October 2010.⁵

WikiLeaks

On 2 December 2010, as part of the WikiLeaks mass release of over a quarter of a million US diplomatic cables (aka Cablegate), the Guardian published a copy of a confidential cable from the political counsellor Richard Mills at the US Embassy in London to the Secretary of State in Washington DC, with the subject line 'HMG floats proposal for marine reserve covering the Chagos Archipelago'.⁶ The cable reported on a meeting between US Embassy officials and BIOT Administration officials at the Foreign and Commonwealth Office (FCO) on 12 May 2009, at which – according to Mills – the then BIOT Commissioner, Colin Roberts, confirmed that the UK Government's current thinking was that:

there would be "no human footprints" or "Man Fridays" on the BIOT's uninhabited islands. *He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents.* (paragraph 7; emphasis in original)

Mills reported that Roberts had asserted that designating the BIOT as a marine reserve would enhance the isolation of Diego Garcia by enabling the authorities to restrict all access except for scientific research (paragraph 9). The then BIOT Administrator Joanne Yeadon indicated, according to Mills, that the Chagossian campaign for the right of return to the outer islands would be further damaged if the US Government could be persuaded to reassert that the entire Chagos Archipelago (and not only Diego Garcia) was required to be unpopulated for defence purposes (paragraph 11). Commenting on the meeting, Mills noted: 'we are concerned that, long-term, both the British public and policy makers would

come to see the existence of a marine reserve as inherently inconsistent with the military use of Diego Garcia' (paragraph 14). He also noted the US Government's concern that after the UK's general elections in 2010 a prospective Conservative Government might seek to recognise the rights of the Chagossians and introduce a timetable for resettlement. Mills concluded: 'Establishing a marine reserve might, indeed, as the FCO's Roberts stated, be the most effective long-term way to prevent any of the Chagos Islands' former inhabitants or their descendants from resettling in the BIOT' (paragraph 15).

Neither Confirm Nor Deny

Olivier Bancoult, the leader of the Chagos Refugees Group in Mauritius, which has been at the forefront of the compensation and right of return cases brought by the Chagossian community against the UK Government (see Jeffery 2006; Jeffery 2009; Vine 2008), had already instructed his legal team in the UK to initiate judicial review proceedings of the MPA on the grounds that the FCO consultation leading to declaration of the MPA had ignored the rights of Chagossians to fish in the Chagos waters and had misrepresented the feasibility of resettlement. The MPA judicial review case – with Olivier Bancoult as claimant and the Secretary of State for Foreign and Commonwealth Affairs as defendant – was eventually developed as follows: firstly that the establishment of the MPA was secretly motivated by the improper purpose of preventing Chagossians from returning; secondly that the FCO's consultation process leading to the declaration of the MPA was inadequate and failed to disclose relevant information about the feasibility of prospective resettlement; thirdly that the UK Government had unilaterally withdrawn traditional fishing rights in the territory; and fourthly that a no-fishing MPA was in contravention of the UK's responsibility with regard to the economic and social development of BIOT as a European territory.

The US Embassy cable published by WikiLeaks assisted development of the argument that the MPA was established with improper purpose: in other words, the argument that although the Government's declared rationale was environmental, the cable confirmed suspicions that the ulterior motive was to damage the Chagossian campaign for the right of return to the Chagos Archipelago. At a preliminary hearing in 2012 the defendant complained that this argument was reliant evidentially on a purported copy of a US Embassy cable that had been obtained and released unlawfully by WikiLeaks. According to the written witness statement of Martin Sterling, a senior policy advisor in the Cabinet Office, Government policy is to Neither Confirm Nor Deny (NCND) the authenticity of unauthorised leaked documents. The rationale for NCND is twofold: firstly, confirming aspects of a leaked document could compound any damage already caused by the leak to the administration of public affairs, and secondly, official commentary on a leaked document rewards those involved in leaking documents by authenticating the document and providing further information in the form of verification or denial. NCND is applied as a general principle because selective commentary would give rise to the supposition that leaked documents whose authenticity is not explicitly denied are implicitly authenticated.

However, the judge, Stanley Burnton LJ, ruled in favour of the claimant, taking the unusual step in judicial review cases of giving the claimant permission to cross-examine both the former BIOT Commissioner Colin Roberts and the former BIOT Administrator Joanne Yeadon.⁷ Burnton LJ concluded that:

I understand why it is the policy of HM Government neither to confirm nor to deny the genuineness of leaked documents ... However, the documents in question have been leaked, and indeed widely published. No claim has been made to the effect that the documents should not be considered by the Court on the grounds of public interest immunity or the like. They are before the Court. The Court will have to decide whether or not they are genuine documents, that they are copies of what they purport to be. The memorandum of the meeting of 12 May 2009, in particular, appears to be a detailed record, which could fairly be the basis of cross examination. (paragraphs 15-16)

Judicial Review in the High Court

Despite Burton LJ's preliminary ruling, during the High Court hearing there was a lengthy procedural debate about whether the leaked cable was admissible as evidence. On the first day of the hearing, the claimant's barrister, Nigel Fleming QC, stated that his intention was to ask the court to authenticate the document as a copy of a genuine US Embassy cable:

I will put questions to the witnesses on the basis that insofar as their evidence is incomplete as to what they said to the American officials, they are not only reminded by what is in this document but also the document itself is a document upon which this court can rely as accurate and genuine.⁸

In response, the defendant's barrister, Steven Kovats QC, said that:

if the question is "Do you agree with the cable?" the answer will be "I neither confirm nor deny that that is an authentic or accurate copy of a cable". If the question is "Having read the cable, is this your recollection of what you said on the meeting?" a proper and full answer to the question to the witness's ability will be given... In other words, we draw a distinction between questioning about what occurred at the meeting, which is, after all, information, and questioning about whether or not those newspaper articles produce an authentic and accurate copy of a classified US cable.

Thus, during cross-examination, Fleming QC read paragraph after paragraph from the cable, asking the witness – first Roberts, then Yeadon – if the information therein was consistent with their own recollections of the meeting. In their witness statements and in cross-examination, both witnesses repeatedly sought refuge firstly in the official policy of NCND and secondly in their own lack of recollection of the meeting; they both claimed not to have taken their own notes during or after the meeting. When they did comment on the content, they

accepted some statements but rejected others: they accepted that it was likely that Roberts had used the evocative phrase 'no human footprints', but they vehemently denied both that Roberts had used the offensive phrase 'Man Fridays' and that the ulterior motive was to damage the chances of Chagossian resettlement.

For the defendant, Kovats QC suggested that even if one accepted the cable as authentic, the witnesses' evidence implied that it supplied an inaccurate record of the meeting. For the claimant, Fleming QC queried: why would the US Embassy official's account be inaccurate? And, as he pointed out, 'the United States is in the course of prosecuting Mr Manning for the distribution of cables not on the basis that they are false cables, but on the basis that they are true cables.' The BIOT officials had accepted that the meeting took place, and had accepted much of what was said. Moreover, Fleming QC argued, this contemporaneous record of the meeting appeared to be more reliable than the witnesses' self-confessed poor recollection of events some four years beforehand at which they claimed not to have taken their own notes, especially since the witnesses had ample political motivations for disputing the written record.

The unreliability of the witnesses was illustrated neatly at another point in the hearing. Fleming QC asked the witnesses about a meeting they had had with Olivier Bancoult and his solicitor Richard Gifford on 25th March 2009. In his oral evidence, Roberts recalled that 'It was in my experience, of some quite remarkable meetings, a very memorable meeting' because Gifford had 'behaved extremely badly' and had said some things that Roberts considered 'offensive'. By contrast, when Fleming QC later asked Yeadon 'did Mr Gifford present the argument for Mr Bancoult in a measured, detailed way?', she replied 'He usually did, yes'. Roberts had said he couldn't recall whether a note had been taken this meeting, and Yeadon said she hadn't taken a note, but later that day Kovats QC interrupted the cross-examination to inform the court that the FCO had just presented him with Yeadon's rediscovered notes from the meeting, which revealed that at the time she had described Gifford's behaviour as 'very hostile'. Richards LJ and Mitting J concluded that 'Nothing turns on these differences of recollection', but from Fleming QC's perspective such 'differences of recollection' demonstrate the poor quality of the oral evidence, giving weight to his argument that the court should rely instead on contemporaneous written documentation.

Vienna Convention on Diplomatic Relations

In the middle of the second day of the hearing, the defendant suddenly sought to apply articles 24 ('The archives and documents of the mission shall be inviolable at any time and wherever they may be') and 27.2 ('The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions') of the Vienna Convention on Diplomatic Relations. The whole of the third day was consequently devoted almost entirely to a lengthy debate about the applicability of the Vienna Convention. For the defendant, Kovats QC argued that 'it is self-evident that the purpose of diplomatic confidential communications is that they should remain diplomatic and confidential' and that they remain diplomatic

communications and part of the Embassy's archive even after having been sent from the Embassy to the State Department. The judges, Stephen Richards LJ and John Mitting J, made a preliminary judgment in favour of the defendant: they were satisfied that article 24 and 27.2 of the Vienna Convention could:

preclude any reliance on the purported copy cable of 15 May 2009 as a copy of a genuine cable from the US Embassy recording what was said at the meeting of 12 May in 2009. In the circumstances, any such cable would be inadmissible in evidence, and the same objection of principle applies to use of the purported copy of it as published by The Telegraph and The Guardian. It will therefore not be open to the claimant to invite the court to treat the purported copy cable as a genuine cable or to find that it contains an accurate record of the meeting.

This was obviously a terrible blow to the claimant's case, which relied on the court agreeing that the US Embassy cable was a more reliable record of the 12 May 2009 meeting than the unreliable evidence offered by the witnesses. The irony is that if it was not an authentic cable then the Vienna Convention could not apply.

In their judgment, Richards LJ and Mitting J ruled against the claimant on all grounds, and suggested that their ruling would have remained the same even if they had ruled differently with regard to the inadmissibility of WikiLeaks evidence.⁹ Firstly, in relation to the charge of improper motive, they concluded that there was no evidence that the Foreign Secretary himself had been motivated by improper purpose: rather, because of the impending election and desire for a lasting environmental legacy, Miliband had overridden his officials' advice to proceed more slowly with the establishment of the MPA (paragraph 74). Secondly, in relation to the charge that the consultation process had been inadequate because of a failure to disclose relevant information about the feasibility of prospective resettlement, they ruled that the undisclosed information was not relevant to a consultation process that was about an MPA and not resettlement (paragraph 92). Thirdly, in relation to the charge that the MPA contravened traditional fishing rights, they accepted the defendant's claim that these were political not legal rights, and that fishing companies were entitled to licences only if the BIOT administration was willing to issue licences at all (paragraphs 140, 143, 148). Fourthly, in relation to the charge that the MPA breached UK obligations to promote economic and social development of the BIOT as European territory, they ruled that the MPA was compatible with EU law (paragraphs 193-200).

Richards LJ and Mitting J did, however, rule that they would not regard NCND as sufficient for refusing to admit the WikiLeaks evidence for four reasons (paragraphs 26-28): firstly, it is not clear that NCND applies to documents that are the property of another government; secondly, the NCND policy allows for certain exceptions; thirdly, the NCND policy is not binding on the court; fourthly, in this case the interests of justice would overrule the NCND policy because the alternative would in principle enable the Government to conceal ulterior motives.

Court of Appeal

The Chagossians' legal team was granted leave to appeal, and over the course of three days in March–April 2014, the two legal teams made their arguments anew before three Court of Appeal judges: John Dyson LJ (who is the most senior Court of Appeal judge in England, known as the Master of the Rolls), Elizabeth Gloster LJ, and Geoffrey Vos LJ. The appeal hearing addressed, *inter alia*, whether the WikiLeaks document is subject to diplomatic immunity and/or admissible as evidence, whether the MPA jeopardises the social and economic development of the Chagos Archipelago as a European overseas territory, and the impact of the MPA on traditional fishing rights.

The claimant's argument for the admissibility of WikiLeaks was developed in court by Robert McCorquodale. Firstly he argued that a receiving state (i.e. the host of a sending state's diplomatic mission) is responsible for the security of a diplomatic mission within its territory, but cannot be responsible for mission documents that have left its territory; in this case the leak of documents took place outwith the UK. Secondly he argued that the concept of the inviolability of diplomatic documents means freedom from interference and not a blanket ban on admissibility in court. For the defendant, Kovats QC argued that the Vienna Convention emphasises that all correspondence relating to the mission is inviolable 'at any time' and 'wherever they may be'. The purpose of inviolability, he said, is to protect against prejudicing the function of the mission, which is to improve international relations, so he cautioned the court against authenticating a confidential diplomatic document. Fleming QC (for the claimant) and Vos LJ (one of the judges) pointed out that the diplomatic document in question has been in the public domain since December 2010, and the US has not shown concern that use of the cable poses danger in the form of new disclosure. Kovats QC replied that the US Government's response to a Freedom of Information request was that the sought-after document was classified. Again, this implies that a genuine document does exist, although the US Government has evidently not confirmed that the classified document it holds is 'identical' to the one released by WikiLeaks.

The claimant's arguments on traditional fishing rights and the applicability of EU law were developed in tandem by Fleming QC and Maya Lester respectively. Lester argued that EU member states have a negative obligation under EU law not to jeopardise the social and economic development of their Overseas Countries and Territories. Chagossian fishermen continued to fish the Chagos waters until 2010, whereupon the UK jeopardised the potential social and economic development of the Chagos Archipelago by imposing a no-take Marine Protected Area prohibiting fishing, which would be the mainstay of the economy in the event of resettlement. For the defendant, Kieron Beal QC focused instead on the lack of positive obligations to facilitate social and economic development. He argued that the ban on commercial fishing does not represent an appreciable impediment to social and economic development because the territory is uninhabited, and that the MPA is not entrenched and could be adapted in case of resettlement. The judgment is expected later this spring.

Comment [LJ1]: I should be able to update this prior to publication with a couple of paragraphs on the judgment.

Resettlement feasibility study, and Mauritian sovereignty

Meanwhile – as the judicial review trundled through hearings and rulings – the ECtHR decided in December 2012 that it did not have the jurisdiction to reconsider compensation and the right of return (see Harris 2013), following which the Coalition Government decided to review UK Government policy with regard to the Chagos Archipelago after all. FCO officials consulted the Chagossian community and other stakeholders in mid-2013 and commissioned KPMG consultants to conduct a resettlement feasibility study in 2014. In this context, the irony is that had the FCO lost the judicial review of the MPA, Conservative and Liberal Democrat politicians could have distanced themselves from the way in which the previous Labour Government imposed the no-take MPA, and could have launched fresh consultations on environmental protection measures. The outcome could well be the status quo in terms of a restrictive marine reserve and UK Government opposition to human resettlement of Chagos, but the Coalition Government would then be in a stronger position to claim that its approach had been more transparent than that of the previous Labour Government.

Crucially, however, sovereignty is still not up for discussion, and the Mauritian Government's own challenge to the MPA under the United Nations Convention on the Law of the Sea (UNCLOS) is being heard behind closed doors by the UN's Permanent Court of Arbitration in April–May 2014. The Mauritian Government argues that the UK does not have the jurisdiction to declare an MPA in this contested territory, while the UK Government argues that the UNCLOS arbitrators do not have jurisdiction over this dispute (see Sand 2013: 143-144). Unsurprisingly, the Mauritian Government and the UK Government predict opposite outcomes for the UNCLOS case. The Mauritian Foreign Minister Arvin Boolell told me confidently that the Mauritian case is very strong, but the other Mauritian intellectuals and FCO officials I spoke to told me that the Mauritian case is fundamentally a sovereignty claim and that UNCLOS is the wrong forum.

Comment [LJ2]: I should be able to flesh out this paragraph prior to publication with an update on the UNCLOS case.

WikiLeaks, NCND, and the Vienna Convention

Beyond the specificities of the Chagos MPA judicial review and its implications for the Chagossian community, the debates in court raise several questions about public interest and responsibility in public office. How should courts weigh up public interest in state security versus public interest in leaked information, especially given that governments sometimes strategically deploy leaks themselves? Can a court require a government official to breach the principle of NCND when the information is already in the public domain and when full disclosure and open discussion is in the interests of justice? How might a court assess the relative reliability of incompatible evidence such as witness statements reliant on self-confessed poor recollection of events that are contradicted by leaked documents that appear to be near-contemporaneous records of the same events? What is the status in law of the government's policy of NCND, particularly regarding a document that purports to be the confidential property of another state? In the age of electronic communication, can a receiving state really be responsible under the Vienna Convention for the security of a sending state's diplomatic documents even when they may be

leaked abroad? And in the Vienna Convention, does 'inviolability' mean inadmissibility as legal evidence or rather freedom from interference?

Note on author

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Notes

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²

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101104/text/101104w0002.htm#10110460000022>

³ Ibid.

⁴

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101013/text/101013w0003.htm#10101334000006>

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<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101021/text/101021w0001.htm#10102149000029>

⁶ <http://www.theguardian.com/world/us-embassy-cables-documents/207149>

⁷ <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2012/2115.html>

⁸ Direct quotes come from the court transcripts made at the expense of the legal teams, which can be requested from rcj.cratu@hmcts.gsi.gov.uk

⁹ <http://www.bailii.org/ew/cases/EWHC/Admin/2013/1502.html>